AUG 3 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1949

No. 242

KOUTSKY-BRENNAN-VANA COMPANY, a Corporation, and INTERVENORS,

Petitioners,

vs.

SANFORD M. FURROW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Counsel for Petitioner.

Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 418 So. 15th St.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

o——o——o

Your petitioners, Koutsky-Brennan-Vana Company, a corporation, and the Intervenors, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on May 17, 1950.

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OPINIONS BELOW

The finding of facts and conclusions of law are found on pages 96 and 105 of the Record. The decree or judg-

ment of the District Court is found on page 108 of the Record. Oral opinion of the District Court is found on page 112 of the Record.

The opinion of the United States Court of Appeals, Ninth Circuit, is found on page 737 of the Record. Judgment is found on page 746 of the Record.

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JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1950 (R. 746). The jurisdiction of the Court is invoked under 28 U. S. Code, Sec. 1254 (1).

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QUESTIONS PRESENTED

The opinion in this case is found on page 737 of the Record, and the Court of Appeals held, that these appeals were consolidated for hearing with that in the Danebo Lumber Company, Inc., v. Koutsky-Brennan-Vana, hereinafter called the Danebo case, and the opinions in the two cases supplement each other (Danebo, R. 160). That the causes of action in these cases are substantially identical in the Federal law involved with that in Vana's complaint in the Danebo case, that is, each complaint seeks rescission of a contract made in a felonious black-marketing conspiracy to defraud the United States and to violate the maximum price regulations of the Emergency Price Control Act, and for restoration of moneys given respondent to persuade respondent to enter into a conspiracy identical with that in the Danebo case.

As these cases involve the same common facts and law as were involved in the Danebo case, we deem it un-

necessary to specifically repeat all that we said in the Danebo case with reference to the questions presented.

There is, however, this difference between the Furrow case and the Danebo case, in that as stated by the Court of Appeals opinion (R. 739) unlike Storms in the Danebo case, where Storms claimed throughout that his options were legitimate transactions which Storms was willing to perform, Furrow baldly offered in his testimony that in a conversation with Kincaide (R. 740), that he would not agree to sell at OPA prices, and that he must have over OPA prices or he would not deal.

Unlike the Danebo case again the lower Court's finding, without m[illegible] is that the transaction was a conspiracy to viol[illegible]e OPA law, the District Court in the Furrow case found all of the above facts constituting the felony of a fraud against the United States, except the executed portion of the felonious agreement of the making of the contract for the sale of the lumber to Kincaide.

As in the Danebo case, none of the retailers secured any lumber from Kincaide before the ceiling prices were removed. All but the Vana Company and the Richardson Company received some lumber after the ceilings were removed at the prevailing market rate. The District Court gave Judgment to Vana for the full sum it paid Furrow. As to those receiving lumber, they had judgment for the amounts paid less $10.80 per thousand of lumber delivered to them (R. 741).

The oral District Court opinion (R. 112) is as follows:

> "In this case the plaintiff and the defendant Furrow, through the agency of the defendant Kin-

caide, entered into a contract whereby the defendants would sell a certain quantity of lumber to the plaintiff at the OPA ceiling price, plus $10 per thousand for dimension lumber and $12 per thousand for boards to be charged against a lump sum of money ($5400) paid to the defendant Furrow for a pretended option in favor of plaintiff to purchase corporate stock owned by Furrow in the mill which was to manufacture the lumber. Similar contracts were made between intervenors and defendants. The parties agreed that such $10 and $12 per thousand of the price in excess of the OPA ceiling price to be taken out of the option money should be received and enjoyed by defendant Furrow as an evasion of the OPA law controlling the price structure. The parties on both sides understood this and expressly agreed to it.

"This is an action to rescind and set aside the lumber sale and option agreements and to recover the money paid for the options. The plaintiff and intervenors assert the right to have the contracts rescinded and to recover back all of the payments made on account of the option contracts without crediting the amounts charged against the option funds for lumber already shipped. The defendants defend against the right of rescission and recovery on the ground that since this is a proceeding in equity, it is required that plaintiff and intervenors, before becoming entitled to equitable relief, must appear in the suit with clean hands from an equitable standpoint. Defendants contend that, while seeking the relief of a court of equity, the plaintiff and intervenors, in order to recover, must be free from any wrong which enters into the creation of the situation from which they seek equitable relief. It is remarkable that in most of the actions the witnesses on both sides testify in effect that this so-called option agreement was an expressly agreed evasion of the OPA law and its maximum ceiling price for lumber. The question is, is this a case where it is proper, just

and equitable to apply the so-called doctrine of unclean hands? Is it upon the facts a case where plaintiff, in comparison with the situation of the defendants, does come into court with hands unclean to a material degree? Was the plaintiff, when its acts in their importance are compared with the importance of defendants' acts, actually in pari delicto, that is, in equal fault or equally to blame, with the defendants? Respecting these questions, the intervenors are in the same position as plaintiff.

"Those questions can be determined only by proper consideration of the respective situations of the plaintiff and of the defendants as the parties faced the emergency demand for critical building materials at the time they were making their contracts.

"We then had the OPA regulating, among other things, prices of lumber, a vital and critically needed building material required for the increased building of homes and other structures urgently required throughout the nation including the Middle West. The plaintiff and the interveners had established businesses in that market and had been selling building supplies, including lumber, to customers who had helped them maintain substantial businesses for a long time. Some of the witnesses on behalf of the interveners testified they had been in business a number of years. The plaintiff and intervenors were faced with the necessity of having stock in trade, lumber, in the face of this emergency housing condition. They had to have something to do business on. They had a trade that had to be supplied if the plaintiffs were to stay in business. They had to have lumber in order to stay in business and in order to supply these customers. The emergency was of far greater importance to the plaintiffs than to the defendants, who had a market which might properly be described as a seller's market. The defendant Furrow testified that he already had arrangements for the sale of all of his mill's products through his own retail outlets in the Middle West, so far as prices at

OPA ceilings were concerned, and it was only at the defendant Kincaide's suggestion of the possibility of an appropriate method of obtaining compensation in addition to the OPA ceilings that the defendant Furrow became interested in the disposing of his mill's products otherwise than through his own retail outlets.

"In any event, the situation of the defendants Kincaide and Furrow was that they were without difficulty in finding customers for their materials. The situation of the plaintiff and intervenors was that they were under an emergent compulsion to obtain the lumber if they were to supply their established trade, so they were in a position of becoming —compared with the defendants—much more easily victimized and they were easily victimized. The Court, not only from the preponderance but from the overwhelming evidence, find, concludes and decides that as between the plaintiff and the intervenors, on the one side, and the defendants Furrow and Kincaide on the other, the law violation of the plaintiff and intervenors was of a degree rather insignificant compared with the degree and importance of the law violation by the defendants, and so far as the doctrine of unclean hands and pari delicto is concerned, the hands of plaintiff and intervenors were clean in comparison with the defendants, and in comparison with the situation of the defendants the plaintiffs and intervenors were not in pari delicto.

"In the case at bar, the facts are different from those in the case decided by Judge McColloch at Portland. In that case there was no part performance. In this case, as to a number, if not most, of the contracts there was some partial performance on both sides of the option contract, but in none do I recall an instance where as much as 50 per cent of the contracted lumber was actually shipped.

"This produces the result, and the Court finds, concludes and decides that the parties will be left by

the Court where they now are with respect to that portion of the contract in each instance which has been performed on both sides, that is, where some of the contracted lumber has been shipped by the defendants and there has been charged against the so-called option fund the amounts in excess of OPA ceiling price specified in the pretended option agreement for the lumber shipped, no recovery as to those amounts will be allowed. But in respect to all parts of the option funds advanced by the plaintiffs and intervenors as to which charges have not been so made on account of lumber actually shipped, the plaintiff and intervenors will recover the balance so unaccounted for. To deny such recovery and thereby leave the option contracts in effect as to the part unperformed by the defendants would be inequitable and unjust, in view of the fact of the emergent necessity which the plaintiff and intervenors had for the obtaining of this lumber and by reason of the relatively unemergent situation in which the defendants were and of the further fact that the defendants might have sold the lumber through other outlets available to them.

"By reason of those considerations, this lumber sale and purchase contract and option agreement whereby so called option payment was paid over to the defendant, Furrow, is rescinded and plaintiff and intervenors may have a money judgment to the extent indicated against only the defendant, Furrow. Such money recovered is limited as against the defendant, Furrow, because, as the Court finds, concludes and decides from the preponderance and from all of the evidence introduced on that point, he is the only one as between these two defendants, Furrow and Kincaide, who has profited directly by this option agreement. In every instance, according to the evidence, the defendant, Kincaide, in negotiating the option agreement was speaking not for himself but for the defendant, Furrow, only, and in every instance the check from the plaintiff and intervenors

in payment of the option consideration was made payable only to the defendant, Furrow.

"Although the defendant Kincaide indirectly received some benefit from the transaction, he did not receive any part of the option considerations. He did receive a finding fee of five per cent, a legal fee, from the lumber sale and purchase agreement obtained by him which might not have been obtained without the aid of the sham option agreement. Nevertheless, he personally took no part of the illegal considerations. He personally directly profited in no amount on account of the illegality of the contract. His only profits came from the legal parts of the contract of sale of lumber as to the lumber shipped. For these reasons and because this action seems to the Court in its nature to be one only upon a contract brought for the purpose only of rescinding that contract and recovering back the considerations paid thereunder, there is no theory upon which the Court could here find that the defendant Kincaide is liable.

"The Court, therefore, finds, concludes and decides that the plaintiff and interveners take nothing by reason of these actions against the defendant Kincaide. The Court further orders that each party pay his own costs incurred in this action. No party will be awarded costs against any other party in this action."

In this opinion the lower Court specifically found that the parties were not in pari delicto, that they were under economic compulsion and that the petitioner and intervenors were entitled to rescind and recover their money back.

The Court of Appeals (R. 742) held that even in this case the parties were in pari delicto, reversing the finding of the lower Court. In order to do so the Court of Appeals found (R. 742); that although all these re-

tailers and Kincaide himself testified that it was practically impossible to obtain lumber at OPA prices, that the Court would take judicial notice of the fact that such a contention does not accord with the facts.

This holding that the parties were in pari delicto was referred to at (R. 744) of the opinion.

The Court of Appeals (R. 742) follows *Anderson v. Carkins,* 135 U. S. 483, at page 491, which held, that one who contracts for another to perjure himself is in pari delicto with the one agreeing to commit perjury.

The Court also followed *Bowles v. Glick,* 146 Fed. (2d) 566 (9 Cir.), claiming that case rejected the reasoning on which rests the claim that retailers are not in pari delicto with those supplying the lumber because they could not otherwise satisfy their need for lumber in their retail business.

It is our contention, therefore, that in the Furrow case the same issues were involved as in the Danebo, and what we said there with reference to our Petition for Certiorari is made applicable here without repeating the claim there made, with the additional distinction that the Court here affirmatively held, that we were not in pari delicto, that we were under economic compulsion and it is our contention that the Court of Appeals had no right to take judicial notice that retailers could get lumber at OPA prices when all the testimony as the opinion admits by Kincaide, and all those involved in this controversy testified that they could not get lumber at OPA prices, and the lower Court so held. The Court of Appeals cannot, under Rule 52 of Federal Rules of Civil Procedure, reverse the lower Court's finding of facts unless clearly wrong.

STATUTES INVOLVED

The statutes involved here are identical with the statutes involved in the Danebo case, and are as follows:

Section 4(a) of the Emergency Control Act, 50 U. S. C. A. Appx., Sec. 904(a) makes it unlawful *as a misdemeanor,* Sec. 205(b), 50 U. S. C. A. Appx., Sec. 925(b), for any person to sell or deliver any commodity in violation of price regulations, "or to offer, solicit, attempt or *agree* to do any of the foregoing."

Conviction under the general conspiracy statute, Sec. 37 of Criminal Code, 18 U. S. C. A., Sec. 88, requires more than *agreement,* namely, the commission of some overt act.

Blumenthal v. U. S., 332 U. S. 539 (560-561), 92 L. Ed. 154 (10), Syl. 7.

STATEMENT

The record shows that the same method was used in getting money from the various retailers that was used in the Danebo case. Furrow's testimony (R. 740) quoted by the Court shows that he was approached by Kincaide, and Furrow said he couldn't afford to sell at OPA ceiling prices, and Kincaide stated that he had a bunch of boys around Iowa and Nebraska who needed lumber badly and perhaps he could make arrangements to get lumber at over ceiling prices. Nothing was done at that time, and the matter was dropped, but he later saw him and this option plan was suggested and carried out. The various checks were given to Kincaide and turned over by him to Furrow, but Furrow kept the money, and did not turn any of it over to the Douglas Fir Products

Company. He still has the money, although demand was made of him for the return of the money, the same as were made in the Danebo case, and he refused to turn the money over.

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SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the contract, as far as the illegal part thereof was concerned, was fully executed, was felonious and criminal in character, was malum per se and not malum prohibitum, and therefore rescission would not lie, and a Court of equity would not aid Vana in recovering his money back.

2. In not holding that where the illegal contract was not malum per se, but only malum prohibitum, and where the only part of the carrying out of the contract was the payment of part of the consideration, and nothing was done by the other party, such a contract was still executory, and even though parties were in pari delicto equity would allow rescission, cancel the contract, and restore the consideration on the theory that public policy is better conserved by allowing rescission before the illegal part of the agreement is carried out, as held by this Court in *Spring Co. v. Knowlton*, 103 U. S. 49, and numerous cases following that decision; also *Kempe vs. U. S.* (8th Cir.), 151 F. (2d) 680 (688).

3. In not enforcing the rule that there can be different measures of guilt, and that this case shows that the retailers desired to comply with the O. P. A. Act and its regulations, but on account of inability to obtain lumber from wholesalers and mills without paying over-ceiling

prices, and as they desired to remain in business and maintain their overhead, they were compelled to agree to some method of obtaining lumber over ceiling, and that where there is such economic duress the Court will allow them to rescind and recover their money back where the contract is executory, as held in *Ring vs. Spina*, 148 F. (2d) 647.

4. In holding that Vana and the other retailers *solicited* the entry into the so-called illegal agreements, when the uncontradicted evidence showed that all the retailers both in the Danebo deal and in the Furrow deal were anxious to get lumber at retail prices. That it was no advantage to them to pay over ceiling prices, because they would have to absorb the overcharge or as suggested by the Court, add the additional cost to the consumer and violate another provision of the Price Control Act.

5. In holding that when Vana advanced the $15,000.00 on July 17, 1946, the illegal part of the agreement was *executed*, because at that time the Court will take judicial notice, that the old Act expired, according to its terms, June 30, 1946, and the new Act did not become effective until July 27, 1946, and the *criminal provisions* of the new Act could not relate back to what was done before it became a law as this would make an act criminal that was not so when done, and would be unconstitutional as an ex post facto law.

6. In holding that what Vana did was felonious as he did not buy any lumber while the OPA was in force nor afterward nor did he agree to buy or solicit the buying while OPA was in force. See *Kempe v. U. S.* (8 Cir.), 151 Fed. 680 (688).

7. In holding that Vana when he paid the $15,000.00 this amounted to an execution of the illegal part of the agreement because if that were so, then there never could be a time when the repentance rule announced in the *Spring Co. v. Knowlton* case in 103 U. S. 49 and in *Thomas v. Wallace*, 12 Wall. 349, referred to in the Danebo opinion as an exception to the general rule that equity will not aid a party to an illegal contract.

8. That the Court erred in reversing the finding of the lower Court that the parties were not in pari delicto in violation of Rule 52 of the Federal Rules of Civil Procedure, which specifically provides that the Circuit Court shall not overrule the finding of facts of the lower Court unless clearly erroneous.

9. The Court also erred, although it admits in its opinion (R. 742) that such blackmarketing was universal among the several thousands of manufacturers and wholesalers through the United States, who were supplying these retailers in the Middle West, and although Kincaide and all other retailers testified that was true, and they could not get lumber without paying over the ceiling price, that the Court would take judicial notice of the fact that such a contention does not accord with the facts.

10. That the Court erred in dismissing all the cases.

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REASONS FOR GRANTING THE WRIT

1. The decision of the Court is directly in contradiction to the repentance rule in the *Spring Co. v. Knowlton* case in the 103 U. S. 49, and numerous Supreme Court decisions of the United States following said case de-

fining Malum Per Se and Malum Prohibitum, and the exception recognized in *Thomas vs. City of Richmond,* 12 Wall. (U. S.) 349. All the cases cited in the opinion save one, are cases where the contract was fully executed or was one seeking to enforce an illegal contract, and all recognized the distinction made in the Knowlton case. This Court should settle what is meant by Malum in Se and Moral Turpitude, and when is a contract executory, as referred to in the case of *Spring Co. vs. Knowlton,* 103 U. S. 49, and *Kempe vs. U. S.,* 151 Fed. 680 (688) (8 Cir.), cert. denied 331 U. S. 843.

2. The Court refused to recognize that there is such a thing as economic coercion, that the act according to its terms was designed as shown by the quotation (R. 7) of the opinion (among numerous other reasons) *to prevent hardships to persons engaged in business,* and on this point is in direct conflict with the case cited in our brief in the Furrow case, that of *Ring v. Spina,* 148 Fed. (2d) 647, so that this lack of harmony should be settled by this Court as to whether economic coercion is a ground for rescission of a contract illegally entered into on that account.

3. Clearly the questions presented are of general importance so as to call for this Court supervision of conflicting Court of Appeals decisions as referred to in Rule 38 (b), and has decided an important question of law as to what is meant by the expression Malum in Se, Malum Prohibitum, and moral turpitude, and has decided a federal question probably in conflict with the leading case of *Spring vs. Knowlton,* and numerous cases following the rule there announced, also recognized as an exception to the general rule in *Thomas vs. City of Richmond,* 12

Wall. 349, and other cases cited as authority in the Court's opinion.

4. That there is involved the question as to whether or not the Court of Appeals can reverse the finding of facts of the lower Court where the finding of facts are clearly not erroneous in violation of Rule 52, Rules of Civil Procedure, and whether or not the Court has the right to take judicial notice that lumber could be purchased at OPA ceiling prices, when all the testimony in this case uncontradictally shows lumber could not be purchased at ceiling prices in sufficient quantities that retailers could maintain their overhead and carry on their business, and whether or not they were under economic coercion or duress, as the lower Court held.

The opinion in this case being in conflict with *Ring v. Spina*, 148 Fed. (2d) 647, 160 A. L. R. 671, Note 681.

Settlement of the questions here involved is plainly in the public interest since these cases are cases of first impression under these OPA regulations, and there are now pending other cases involving the same common facts, and law in the states of Oregon and Iowa on stipulation abiding the outcome of these two suits, and if there is, as suggested by the Court in its opinion the possibility of another war, and if so similar regulations to the OPA then the liabilities of the parties should be settled by this Court.

This Court should definitely settle the question as to whether before the illegal part of such an agreement as is here presented, is actually carried out this Court will allow a rescission of the contract and a recovery of the money paid down on the theory that public policy is bet-

ter preserved by thus preventing the carrying out of the illegal transaction, thus enforcing the unjust enrichment sale, and at the same time in a better way carry out the public policy of the Government.

These questions as far as we have been able to ascertain have not been settled or passed by the Supreme Court of the United States, and are of such general interest that this Court should settle the matter involved in these controversies.

That the Court of Appeals cannot, under Rule 52 of Federal Rules of Civil Procedure, reverse the findings of facts of the lower Court.

See recent cases of:

Small vs. Schultz, 180 Fed. 351.

Dearborn National Casualty Co. vs. Consumers Petroleum Co., 178 Fed. 277.

Wald vs. Eagle Indemnity Co. (Tex.), 187 F. (2d) 91.

U. S. vs. Fotopulos (9 Cir.), 180 F. (2d) 631.

Moss vs. U. S., 179 F. (2d) 824.

For these additional reasons and the reasons set forth in the Danebo case a Writ of Certiorari should be granted.

Respectfully submitted,

S. L. WINTERS,
Counsel for Petitioner.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

We deem it unnecessary to repeat in our Argument here all the Assignments or reasons given above for granting the Petition for Writ of Certiorari, as it will just result in duplication and unduly prolong this Petition.

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ARGUMENT

As stated in the Court of Appeals' opinion both cases involve similar facts and law and the opinions supplement each other, and therefore, what is said here with reference to one case is applicable also to the other, and therefore, need not be repeated in each case, except that in the Danebo case no specific findings were made as to whether or not the parties were in pari delicto, nor as to whether or not there is such a thing as economic coercion or duress.

Judge McColloch in his case based his decision upon the broad principle that while all parties intended to evade the price control act and the regulations pursuant thereto, Storms and Danebo got the retailers' money, never furnished any lumber thereunder, and applying the rule of unjust enrichment they would not have the right to keep the money and rendered judgment against Storms and Danebo for the full amount retained.

The Court orally announced from the bench that they received the retailers' money, and did not deliver any lumber, therefore, under the above rule would not have the right to keep the money.

In the Furrow case District Judge Bowen held specifically, that the parties were not in pari delicto, that the retailers' hands were comparatively clean compared to Furrow, and they were under economic coercion or duress, and were, therefore, entitled to rescind and recover their money back.

The Court of Appeals in both of these opinions reversed the District Courts and squarely held that these parties were in pari delicto, that they had entered into a *felonious* conspiracy to *defraud the Government* and to evade the OPA Regulations, and that these violations were malum per se and not malum prohibitum, and were executed, and not executory, therefore, not within the repentance rule announced in the case of *Spring v. Knowlton,* 103 U. S. 49, upon which we rely, and the numerous cases in which that same rule was applied throughout the country. That case announced the rule that even if the parties were in pari delicto still as the contract was not malum per se but simply malum prohibitum, that is, simply prohibited by law, and did not involve moral turpitude, that while the contract was executory, save that the money was paid down, but the illegal purpose not carried out, the parties to such an illegal agreement could rescind and recover the money back, on the theory that public policy is better conserved by allowing a rescission by one of the guilty parties rather than to permit the illegal part of the agreement to be carried out, and the purpose of the law frustrated.

It is our contention that the reference in the opinion to the Government being defrauded was not involved in this controversy, because the Government was *not defrauded in any way.*

The Court of Appeals stated in their opinions that the contract as alleged was not proven, but we submit that is contrary to the fact, because all the retailers testified that they wanted to buy lumber at OPA prices, and that it was next to impossible to get lumber at OPA prices because the wholesalers and mills would not sell at OPA prices. Yet the Court said in its opinion that it would take judicial notice that although all the retailers so testified, and the lower Court found that they were under economic duress or coercion and were compelled on account of their investment to buy lumber over OPA prices. Yet the Court said it would take judicial notice that that was not true, and that our contract was not proven.

Our witnesses testified that the scheme advanced by Kincaide on behalf of the defendants was that there was to be a sham option contract, their money was to be advanced on those sham contracts, and the money so advanced was to be used as a fund out of which the excess price over OPA was to be paid, and the balance of the purchase price to be invoiced at OPA ceiling prices while OPA was on, and the excess $10.00 to $12.00 per 1,000 feet was to be taken out of the advanced option payment until the fund was exhausted, and if OPA went off then they were to get lumber at wholesale as evidenced by the Long Bell Lumber Company and the Weyerhauser Company. The lumber, however, was to be invoiced at $10 and $12 below said established market price, and the difference taken out of the funds until the fund was exhausted.

That was the only contract proved at the trial. As the opinions point out Storms claims that the option was a bona fide executed agreement, and that is the only con-

tract he claimed was made, but the Court held against him.

The opinions admit that unlike the Danebo case, Furrow baldly admitted he would not sell at OPA prices. Furrow did not deny the claims of all the retailers that whether the OPA was on or not, the money advanced on the so-called options were to be credited on the price paid for lumber.

In order to get around the so-called repentance rule, the Court of Appeals held that the payment of the money down was a payment for so much lumber and, therefore, the contract was not executory within the Knowlton case rule but was executed.

We submit, however, that could not be true as a matter of law, because if the down payment makes the contract so far executed that it cannot be rescinded then there will never be a time when the repentance rule announced in the Knowlton case could be applied, and there would be no money to recover back. The Knowlton case clearly recognized the rule that if the contract is executed only to the extent that the money is paid down as there is nothing down on the other side, that that part performance will not take it out of the rule allowing rescission and consequent recovery.

All the cases cited in the Court of Appeals opinions are cases where attempts were made either to enforce the illegal contract or to recover the money back after the contract has been fully executed, and in every one of the cases except one the Knowlton rule was admitted and distinguished. The Pullman Palace Car case in the 171

U. S. is recognized and distinguished. Again the Court of Appeals, in order to get out from under the rule announced in the Knowlton case and cases following that case, held that this attempt of Vana and the other retailers was a *felonious conspiracy* to evade OPA regulations and *defraud the United States,* and were *malum per se* and not *malum prohibitum.*

It was unfortunate that the United States Supreme Court in the Knowlton case did not define the meaning of "malum per se" and "malum prohibitum," and did not define the expression there used of "moral turpitude." But it was our contention that it clearly would mean that where the act, as in this case, was just a violation of the statute in paying an over-ceiling price, this did not involve moral turpitude and was not malum per se. That is one of the reasons why we say that case is now of such importance that this Court should define what is meant by the expressions malum per se and malum prohibitum, and what actions do involve moral turpitude.

It is our contention also that these opinions of the Court of Appeals are in direct conflict with other opinions of the Supreme Court of the United States.

For instance in *McCullen v. Hauptman,* 174 U. S. 639 (654), this Court stated:

> "It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties, so that nothing remains thereof for a completion, money received by him without resorting to the contract, the Court will permit a recovery in such case."

Again, in *Thomas v. City of Richmond,* 12 Wall. 349, approved by the Court of Appeals in those cases, the

Supreme Court recognized the rule that we contend is applicable here, and which was applied in the Knowlton case, on the right to rescind an executory contract, following with approval the English case, 2nd Douglas 696, to the effect that:

> "Even where the parties are in pari delicto, but where the law violated is calculated for the protection of the subject against oppression, extortion and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover, and a recovery can be had for money had and received where the illegality consists (1) In the contract itself, and that contract is not executed, in such case there is a locus poenitentiae and deliction is incomplete, and the contract may be rescinded. (2) Where the law that created the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where one party is the *principal offender* and the other only criminal, from a constrained acquiescence in such conduct there is no parity of deliction at all between the parties, and the party so protected by the law or so acting under compulsion may at any time resort to the law for his remedy, *though the illegal transaction be completed.*"

These appeals are out of harmony with the case of *National Bank & Loan Co. v. Pettrie,* 189 U. S. 423, where the Court stated that if the withdrawal from the contract was on the ground of repentance alone, the law might or might not leave the parties where it found it, following the Pullman Palace Car case, 171 U. S., which case follows the Knowlton case in 103 U. S. relied upon by us. But the Court went on to say in the Pettrie case that a person did not become an outlaw or lose all rights by doing an illegal act.

It is our further contention that these opinions in controversy, which squarely hold that Vana and these retailers were guilty of a *felonious conspiracy* to evade the OPA regulations, and were in pari delicto, is clearly and directly opposite to the case of *Kempe v. United States,* 151 F. (2d) 680 (688), 8th Circuit, where the Court squarely held that the violation to the OPA regulations, while criminal offenses are *misdemeanors only,* and not *infamous* crimes within the meaning of the 5th Amendment to the United States Constitution, and could be prosecuted by fine or imprisonment, or both. Following on this point *Falconio v. United States* (6th Circuit), 280 Fed. 766.

Rosini v. United States, 6 Fed. (2d) 350.

Brede v. Powers, 263 U. S. 4, 44 S. C. R. 8.

At page 688 this Kempe case in defining malum in se stated:

> "Federal crimes have been divided according to their nature into crimes malum in se, and malum prohibita, the former comprise those acts which are immoral, or wrong in themselves, such as murder, rape, arson, burglary, larceny, breach of the peace, forgery, and the like, the latter embraces those things which are prohibited by statute, because they infringe on the rights of others although no moral turpitude may attach, and they are crimes only because they are prohibited by statute. Generally crimes malum in se involve moral turpitude, while crimes malum prohibitum do not." Certiorari denied 331 U. S. 843, 91 L. Ed. 1854, 67 S. C. R. 1534.

These cases we contend are directly opposite to the Circuit Court of Appeals' decision in this case, therefore, furnishes another reason why the Petition for Certiorari should be granted.

We submit there is nothing involving moral turpitude in agreeing to buy lumber at a certain price even though that price was over the ceiling price. We further contend that the violation of these acts are not a *felony,* and are, therefore, not *malum in se* as the Court of Appeals decided in these two cases.

In the Danebo case the agreement was entered into when the OPA was off. The OPA expired according to its terms June 30, 1946, and were not restored until July 27, 1946, and it was in the interim that these agreements were entered into in the Danebo case.

In the Danebo case no lumber was ever delivered to anyone. Therefore, the only illegal agreement was that they *agreed* at a time when the OPA was off that they would buy lumber if the OPA went on in excess of the OPA price as they testified.

That these violations are not felonies and not malem in se was also held in effect in the recent case of *Blumenthal v. United States* (Calif.), 332 U. S. 539, 68 S. C. R. 248, 92 L. Ed. 154, rehearing denied 68 S. C. R. 385, 332 U. S. 856, 92 L. Ed. (9th Circuit), where the Court at page 561 of the 332 U. S. stated:

> "That the prosecution under Section 4 (a) under Emergency Price Control Act, 50 U. S. C. A., App. 904 (a) makes it unlawful as a *misdemeanor,* Sec. 205 (b) 50 USCA, Appx. 925 (b) for any person to sell or deliver any commodity in violation of price regulations, or to offer, solicit, attempt or *agree* to do any of the foregoing, and that conviction under this section cannot be had under the general conspiracy statute, which requires more than mere *agreement,* namely, the commission of an overt act." Citing *Taub v. Bowles,* 149 Fed. (2d) 817.

The cases at bar are clearly in direct conflict with these cases just cited, and they seek to hold that this is a *felonious* conspiracy *malem in se,* and are fully *executed* when the money is simply paid down on an illegal contract, and therefore, for that reason it is of general importance that this petition may be granted so that this Court may definitely determine for future guidance what is meant by an executed or an executory contract, malem per se or malem prohibitum.

Again these opinions clearly reverse the lower Court's holding in the Furrow case, in holding that they were not in pari delicto, and they could not get lumber at OPA prices without paying over ceiling prices.

The statute quoted in these opinions wherein the OPA gives the reasons why Congress adopted this act, specifically refers to one of the reasons being to prevent *hardship for persons engaged in trade or business,* and they were, therefore, clearly within the persons to be *protected* by the Emergency Price Control Act. They were *victims* rather than *felonious* conspirators, and were within the class designed to be *protected* as it worked a hardship on them in that they were forced to pay over ceiling prices or *go out of business.*

This rule was recognized by Judge Bowen in his opinion in the lower Court. That there is such a thing as economic coercion or duress which is clearly denied in these opinions is evidenced by the extracts that we gave above in *Thomas v. City of Richmond* and other cases, is also evidenced by the leading case of *Ring v. Spina,* 148 Fed. 647 (8th Circuit), which by the way is directly opposite to the opinions in these cases, and therefore

calls for the granting of a Petition for Certiorari on the ground that they are in direct disharmony. That was a case where the plaintiff sued defendant for treble damages under a contract which he alleged was in violation of the Sherman Anti Trust Act. The defendants claim that plaintiffs were not entitled to relief, because he signed the basic agreement which, among other things, promised any of its members to lease, or license a play; defendant limits contracts by both manager and authors under its own terms, and they must be in good standing with the guild. It appears that plaintiff signed the agreement which was in violation of the Sherman Anti Trust Act. The plaintiff was interested in the protection of a play known as the "Stove Pipe Hat," and he claims he signed this restrictive agreement in violation of the Sherman Anti Trust Act *against his will,* and under *coercive pressure,* and rules and regulations of the guild, in order that he might protect his part in the venture. Then a dispute arose between the parties as the defendant claimed that the plaintiff made changes in the play, which breached the basic agreement above referred to, and they, therefore, terminated his contract. The play was forced to close, and therefore, he sought this injunctive relief. The lower Court denied him any relief, but the Circuit Court reversed this finding, and held, that as the evidence showed that plaintiff had invested considerable money in the production of the play, and that he found it impossible to show the play until he in turn became a member of the guild in good standing by signing the basic agreement. The rules of the guild permitted no other course, thus he had to sign to save his $50,000.00 investment, and to safeguard his future attempts to bring the venture to fruition.

The Circuit Court then states that this seems to us a prima facie showing of *economic coercion*. In discussing this matter the Court said page 652:

> "It is well settled that where one party to an illegal contract acts under the duress of another, the parties are not in pari delicto, and where there is a showing of *economic duress* similar to that asserted here, it has been held sufficient proof that the plaintiff was not a party to the monopoly." Citing numerous cases.

They went further to say:

> "There appears to be a definite tendency to hold those not actively engaged in promoting monopolies to be *victims* rather than participants in the violation."

They went further to say:

> "But here even without a showing of economic coercion as the final step in forcing him to sign the basic agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to *protect*, and conditions of public policy demand the court's intervention in behalf of such a person even if technically he be considered in pari delicto. Indeed this is a general principle applicable beyond the anti trust field."

These decisions, therefore, at bar are clearly directly opposed by the case of *Ring v. Spina* above cited. That furnishes another reason why the Petition for Certiorari should be granted.

The Knowlton case that we have so repeatedly referred to has this to say with reference to whether you can recover back when you pay the money down:

> "The question presented is, therefore, whether conceding said contract to be illegal money paid by one

of the parties in *part performance* can be recovered, the other party not having performed the contract, or any part thereof, and both parties having *abandoned the illegal agreement before it was consummated.* We think the authorities sustain the affirmative of this proposition."

Here the evidence clearly shows that we come squarely within that doctrine, therefore, the decisions in these cases are in direct conflict with the Knowlton case above cited.

Bowles v. Glick Bros. Lumber Company (Cal.), 9th Circuit, 146 Fed. (2d) 566, was cited with approval in the Court of Appeals' decisions to the effect that parties both the buyers and sellers are in pari delicto, but an examination of that case will show that was dictum only, because whether or not they were in pari delicto the retailers cannot recover under a case like the one involved in the Glick case, which was an action to recover treble damages, not because they were in pari delicto, but because the statute by its *peculiar wording* prohibited those who purchase for *use in their trade or business from* recovering treble damages because they are not within the peculiar wording of the statute as those who buy for use in their trade and business are expressly *excluded* from the act. Even a farmer who buys a tractor in violation of the Emergency Price Control Act cannot recover the treble damages as he buys for use in his trade or business, that of a farmer. That this class cannot recover for treble damages does not prevent them from being within the persons protected under the act, as the act is designed expressly to protect those on which it works a *hardship in their trade or business,* and certainly it works a hardship on these retailers to be com-

pelled to pay more than OPA ceiling prices, and certainly it is no advantage to them to have to do so.

Circuit Court Violated Rule 52 of Federal Rules of Civil Procedure

Again the reversal of the Circuit Court of Appeals of the facts found by the lower Court in the Furrow case was in direct violation of Rule 52 of the Federal Rules of Civil Procedure, which provides as follows:

> "The findings of fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Especially is this true where the opinion admits that everyone who testified on that point, testified that it was next to impossible to get lumber without paying more than OPA prices, and the lower Court so expressly found, and yet these opinions set aside the finding of the lower Court and announce the astounding doctrine, that although every one testified to that, *they will take judicial notice that that was not true.*

That the trial Court's findings of fact should not be set aside or disturbed on appeal unless clearly erroneous is decided, besides numerous other cases, by the following recent decisions:

Dearborn Natl. Gas Co. v. Consumers Petro. Co. (Ill.), 178 Fed. (2d) 277.

Small v. Schultz, 180 Fed. (2d) 351.

Orvis v. Higgans (N. Y.), 180 Fed. (2d) 537.

United States v. Fotopulos (9th Circuit), 180 Fed. (2d) 633.

Moss v. United States, 179 Fed. (2d) 824.

United States ex rel. DeLucia v. O'Donovan, 178 Fed. (2d) 876.

Walker v. United States, 180 Fed. (2d) 217.

These decisions of the Court of Appeals are in direct opposition to the rule announced in *Spring Co. v. Knowlton,* 103 U. S. 49, and numerous cases following that rule. They are in direct violation of the *economic coercion* or *duress rule* found by the lower Court in the Furrow case, and direct opposition to such a rule announced in the *Ring v. Spina* case, and extracts from other Supreme Court decisions referred to in this brief.

It is in direct violation of Rule 52 of the Federal Rules of Civil Procedure which prohibits the reversal of the lower Court, unless the findings of fact are clearly erroneous, and it is in direct violation of the Kempe case, which holds that these regulations are a misdemeanor only, and are not malem per se, and the Supreme Court should clarify these cases, and settle the proposition as to what is meant by malem per se, and malem prohibitum, and moral turpitude.

As pointed out in the opinions there may be another War, and it is of the utmost importance that similar provisions, if they are passed by Congress should have the proper construction, and several cases are still pending in Oregon and Iowa awaiting the result of these cases.

o———o———o

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

S. L. Winters,
George C. Reinmiller,
Counsel for Petitioner.

No. 242

SEP 6 1950

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1950

KOOTENAY-SPOKANE-VANA COMPANY, a corporation, and Intervenors,
Petitioners,

vs.

SANFORD M. FISHBOW,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1950

KOUTSKY-BRENNAN-VANA COMPANY, a corporation, and Intervenors,
Petitioners,

vs.

SANFORD M. FURROW,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Findings of Fact and Conclusions of Law of the United States District Court may be found on pages 95 to 108 of the transcript of record.

The opinion of the United States Court of Appeals for the Ninth Circuit will be found on pages 737 to 745 (transcript of record).

JURISDICTION

The jurisdiction of this court is invoked under Section 1254, United States Code.

QUESTIONS PRESENTED

The real issue presented in the lower courts and to which the petitioners do not allude was and is whether or not the petitioners are entitled to maintain an action in equity to cancel an illegal contract and to recover moneys which it paid thereunder to respondent in pursuance of an unlawful and illegal purpose and in violation of the Emergency Price Control Act of 1942 as amended (Title 50, app. U. S. C. A. Sections 901 946).

The Court of Appeals held that the petitioners were not entitled to maintain such action.

STATUTES INVOLVED

Section 4 of the Emergency Price Control Act of 1942 as amended (Sec. 904 (a), Title 50 App. U. S. C. A.) reads as follows:

> "(a) It shall be unlawful, regardless of any contract, agreement, lease; or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any

act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (sections 922 (b) or 925 (f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing."

Title 18, Sec. 88, U. S. Code Annotated reads as follows:

"(Criminal Code, section 37.) Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 540; May 17, 1879, c. 8, 21 Stat.; Mar. 4, 1909, c. 321 sec. 37, 35 Stat. 1096.)"

STATEMENT

The petitioners in their respective complaints filed in the United States District Court, Western District of Washington, Northern Division, alleged that they paid the several sums sued for to the respondent for the purchase of lumber over the maximum ceiling price as established under Emergency

Price Control Act of 1942 as amended and with the deliberate intent and purpose of violating said Emergency Price Control Act. (Trans. of record 2-45.)

Mr. Vana, the Manager for one of the petitioners, testified that the $5400.00 paid by his company was to be applied at the rate of $10.00 per thousand feet over the ceiling price on dimension and $12.00 a thousand over the ceiling price for boards. (Trans. of record pages 501, 502 and 512.)

Specifically Mr. Vana testified (trans. of record p. 512):

> "I paid $5400.00 to Kincaide and Mr. Sam Furrow for the purpose of getting lumber over OPA ceiling at the rate of $10 and $12 a thousand."

The testimony of the respective intervenors was of like tenor.

The Court of Appeals also found:

> "Unlike in the Danebo case, where the short finding, without more, is that the transaction was a conspiracy to violate the OPA law, the District Court in the instant case found all of the above facts constituting the felony or a fraud against the United States, except the executed portion of the felonious agreement of the making of the contract for the sale of the lumber to Kincaide. That, however, appears in the evidence, which included the text of that con tract." (Trans. of record p. 741.)

ARGUMENT

At the outset the respondent contends that under the established rules of this court (Rule 38, Sec. 5 (b)) this court will not and should not entertain a petition for a writ of certiorari as the petitioners have not brought themselves within the scope of this rule and certainly there are no other reasons assigned which could or should appeal to the discretion of this court to go beyond the specifications of this rule.

As we have hereinbefore pointed out the petitioners alleged in their respective complaints that the transactions had with Kincaide and the respondent were for the purpose of procuring lumber over and above the established maximum ceiling price and that the money was paid to the respondent in each instance to cover the over ceiling cost of the lumber to be furnished. Thus they allege and concede a conspiracy in violation of Section 37 of the U. S. Criminal Code, the text of which we have quoted on page 3 of this brief. Such violation constitutes a felony under the definition of the Criminal Code (U. S. Criminal Code Sec. 335, 18 U. S. C. A. Sec. 541). It cannot be denied that the commission of a felony is malum in se and involves moral turpitude.

We are at a loss to know how to proceed with an answer to petitioners' brief in support of the

Petition for a Writ of Certiorari in view of the failure to clearly state the questions presented, and the numerous errors and misstatements of both fact and law which form the foundation of petitioners' argument.

To demonstrate our dilemma and advise the Court of the facts, we shall first call attention to some of the more glaring errors and misstatements mentioned.

By Specification of Error 5 (Petitioners' Brief p. 12) the petitioners claim error of the Court of Appeals:

> "5. In holding that when Vana advanced the $15,000.00 on July 17, 1946, the illegal part of the agreement was *executed*, because at that time the Court will take judicial notice, that the old Act expired, according to its terms, June 30, 1946, and the new Act did not become effective until July 27, 1946, and the *criminal provisions* of the new Act could not relate back to what was done before it became a law as this would make an act criminal that was not so when done, and would be unconstitutional as an ex post facto law."

There is no basis in fact for such an assignment of error.

By its Complaint (R. 2-8), petitioner Vana alleged that it entered into an option agreement with

respondent Furrow in November of 1946 and that it "delivered its check payable to the defendant, Sanford M. Furrow, dated September 10, 1946, in the sum of $5,400.00 (R. 6). The prayer of the Complaint is "that judgment be rendered for the sum of $5,400.00 in favor of the plaintiff-complainant" (R. 7).

There is no evidence in this record to support the statement that Vana ever advanced $15,000.00 on July 7, 1946, or any other date, nor is there any evidence to support any other part of Specification of Error No. 5.

The lack of factual basis as mentioned, with respect to Specification of Error No. 5, also vitally affects Specifications of Error No. 6 and No. 7, which are predicated upon the same erroneous factual background.

Complaint is made at numerous places throughout petitioners' Petition and brief (p. 9, 13, 19, 29) and, in fact, the backbone of petitioners' claim to right of review, is predicated upon the contention that the Court of Appeals stated it would "take judicial notice that retailers could get lumber at OPA prices (R. 9). Let us look at what the Court of Appeals did say: (R. 742)

> "The process of reasoning of the appellees is plainly that such blackmarketing was uni-

versal among the several thousands of manufacturers and wholesalers throughout the United States, who were supplying these retailers in the Middle West. This appears in the testimony of Kincaide and others in describing their own felonious conduct. *We take judicial notice of the fact that such a contention does not accord with the facts.* Even if it were true that 'everybody is doing it' nobody so could violate the law with clean hands." (R. 742) *Emphasis supplied.*

Having quoted the Court of Appeals, let us now see what petitioners, through their counsel, have told this Court was held.

Petitioners' Brief, p. 9:

"and it is our contention that the Court of Appeals has no right to take judicial notice that retailers could get lumber at OPA prices."

Petitioners' Brief, p. 13: Specification of Error No. 9:

"9. The Court also erred, although it admits in its opinion (R. 742) that such blackmarketing was universal among the several thousands of manufacturers and wholesalers through the United States, who were supplying these retailers in the Middle West, and although Kincaide and all other retailers testified that was true, and they could not get lumber without paying over the ceiling price, that the Court would take judicial notice of the fact that such a contention does not accord with the facts."

Petitioners' Brief, p. 19:

> "Yet the Court said in its opinion that it would take judicial notice that although all retailers so testified, and the lower court found that they were under economic duress or coercion and were compelled on account of their investment to buy lumber over OPA prices. Yet the Court said it would take judicial notice that that was not true, and that our contract was not proven."

Petitioners' Brief, p. 29:

> "Especially is this true where the opinion admits that everyone who testified on that point, testified that it was next to impossible to get lumber without paying more than OPA prices, and the lower Court so expressly found, and yet these opinions set aside the finding of the lower Court and announce the astounding doctrine, that although every one testified to that, *they will take judicial notice that that was not true.*"

It is difficult to understand how counsel could have so misconstrued the clear language of the Court of Appeals, as heretofore quoted. Clearly contentions based upon such misconstruction of language should not be given serious consideration.

Repeatedly throughout their Petition and brief the petitioners make the claim and contention that the lower Court held that the petitioners "were under economic compulsion" or "economic duress

or coercion" (Brief 8, 9, 18, 19, 30) when they entered into the conspiracy to violate the Emergency Price Control Act. This contention and claim is contrary to the record.

The alleged basis for the claim is to be found in the language of the oral opinion of the District Court (R. 115) as follows:

> "In any event, the situation of the defendants Kincaide and Furrow was that they were without difficulty in finding customers for their materials. The situation of the plaintiff and intervenors was that *they were under an emergent compulsion* to obtain the lumber if they were to supply their established trade, so they were in a position of becoming — compared with the defendants—much more easily victimized and they were easily victimized." *(Emphasis supplied.)*

We fail to see how the phrase "emergent compulsion" can be so easily changed in the mind of counsel for petitioners to "economic compulsion" and "economic duress."

It is significant that the District Court made no Finding of Fact or Conclusion of Law to the effect that petitioners acted under "economic compulsion" or "duress" or "coercion."

In the light of this record, we quote from petitioners' brief, as follows:

Petitioners' Brief, p. 8:

"In this opinion the lower Court specifically found that the parties * * * were under economic compulsion."

Petitioners' Brief, p. 9:

"* * * the Court here affirmatively held, * * * that we were under economic compulsion."

Petitioners' Brief, p. 18:

"In the Furrow case District Judge Bowen held specifically, that * * * they were under economic coercion or duress."

Petitioners' Brief, p. 19:

"* * * and the lower Court found that they were under economic duress or coercion and were compelled on account of their investment to buy lumber over OPA prices."

Petitioners' Brief, p. 30:

"They are in direct violation of the *economic coercion* or *duress rule* found by the lower Court in the Furrow case * * *."

Again the petitioners have misconstrued and perverted the record as the basis for their Petition.

There is another glaring defect in petitioners' Petition and brief. The Petition is stated (p. 1) as being on behalf of "Koutsky-Brennan-Vana Company, a corporation, and the Intervenors." The record (R. 14) discloses that the intervenors are Har-

berg Lumber Company, a corporation, The Sothman Company, a corporation, Day & Frees, a corporation A. Keohler Company, a corporation, Searle & Chapin Lumber Company, a corporation, Pauley Lumber Company, a corporation, Richardson Lumber Company, a corporation, and Frank O. Akin.

Notwithstanding this record fact, Specifications of Error Nos. 1, 5, 6 and 7 refer solely to "Vana."

The record is entirely silent as to whether the additional intervenors, R. Wallace Mawson and The Colorado National Bank of Denver, Co-Executors of the Estate of R. Irl Mawson, Deceased, are parties to the Petition. In the absence of such information, it must be assumed that they are not parties. It therefore appears that only a part of the parties to the record are requesting *Certiorari.*

Petitioners, through their counsel, have likewise committed gross errors and omissions in the purported quotations from authorities, as set forth in their Petition and brief.

At Page 21 of the brief, petitioners purport to quote from the case referred to as *McCullen v. Hauptman,* 174 U. S. 639, at p. 654. In the first place, the correct name of the case is *McMullen v. Hoffman.* In the second place, the case fully supports the opinion of the United States Court of Appeals for the Ninth Circuit in this case, and it is only

through lifting a portion of the language from the opinion out of context, and by erroneously quoting that portion lifted, that any support can be found for petitioners' claim. To demonstrate this fact, we find it necessary to quote certain paragraphs preceding that purported to have been quoted by petitioners, and in the paragraph which petitioners purported to quote we shall set forth in brackets all portions omitted or incorrectly quoted:

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis.*
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>
> "The general proposition is not disputed, but certain explanations as to its meaning and extent have been announced by the courts in cases now to be referred to, and the effort has been to show that the case before us comes under some of the exceptions to the rule, and ought not to be governed by the so-called harshness of the rule itself.
>
> "If the partnership agreement that is contained in the writing above set forth is in truth but part of an entire agreement, which con-

tains utterly illegal provisions, then this action cannot be maintained within any of the authorities.

"It is only by proving the partnership agreement as an entire agreement, separate and free from the balance of the agreement between the parties, that argument can be made in favor of its validity. [It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties so that nothing remains thereof for completion, if the plaintiff can recover from the defendant moneys received by him without resorting to the contract, the court will permit a recovery in such case.] The cases cited as illustrating the exception are, among others, *Tenant v. Elliott,* (1797) 1 Bos. & Pul. 2; *Farmer v. Russell,* (1798) 1Bos. & Pul. 295; *Sharp v. Taylor,* (1849) 2 Phil. Ch. 801, 817; *Armstrong v. Toler,* (1826) 11 Wheat. 258, 269; *McBlair v. Gibbes, supra,* 17 How. 232, 235; *Brooks v. Martin,* (1863) 2 Wall. 70; *Planters' Bank v. Union Bank,* (1872) 16 Wall 483; *Armstrong v. American Exchange National Bank of Chicago,* (1889) 133 U. S. 433, 466.

"Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he

founds his cause of action may be legal. *Booth v. Hodgson,* 6 T. R. 405, 408; *Thomson v. Thomson,* 7 Ves. 468; *Embrey v. Jemison,* 131 U. S. 336, 348."

Petitioners have next, in their brief, made reference to the case of *Thomas v. City of Richmond,* 12 Wall. 349 (Brief, p. 21); at page 22, they purport to quote from this case. Again, to demonstrate the perversion of the quotation, it is necessary to here quote the entire portion from which the purported quotation is taken and to indicate by brackets the portion of the actual quotation as either ommitted or incorrectly quoted:

" '[If the act be in itself immoral, or a violation of the general laws of public policy] [Even where the] [both] parties are *in pari delicto,* but where the law violated is calculated for the protection of the subject against oppression, extortion, and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover.' [, and] [In that case the plaintiff had given the defendant money to sign her brother's bankrupt certificate, and she was allowed to recover it back, the law prohibiting any creditor from receiving money for such a purpose. Whilst the general principle had been frequently recognized, the application of it to particular cases has been somewhat diverse. Mr. Frere, in his note to Smith v. Bromley, thus sums up the result of the cases:] A recovery can be had

[, has] for money had and received [1st] where the illegality consists [(1)] in the contract itself, and that contract is not executed [—] in such case there is a *locus poenitentiae,* [the *delictum*] [and deliction] is incomplete, and the contract may be rescinded [by either party;] (2d) where the law that [creates] [created] the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where [the] one party is the principal offender and the other only criminal [,] from a constrained acquiescence in such [illegal] conduct [—in such cases] there is no *parity of delictum* at all between the parties, and the party so protected by the law or so acting under compulsion, may, at any time, resort to the law for his remedy, though the illegal transaction be completed."

On page 23, they purport to quote from *Kempe v. United States,* 151 F. (2d) 680, at page 688. In order to demonstrate the perversion of the quotation, we shall put in brackets the portions omitted from the quotation or incorrectly quoted in petitioners' brief:

"[In 22 C. J. S. Criminal Law, Sec. 8, p. 58, it is said:] [Federal] Crimes have been divided according to their nature into crimes mala [malum] in se, and [crimes] mala [malum] prohibita; the former [class] comprise[s] those acts which are immoral[,] or wrong in themselves, such as murder, rape, arson, burglary, and larceny, breach of the peace, forgery, and

the like, [while] the latter embraces those things which are prohibited by statute[,] because they impinge upon the rights of others[,] although no moral turpitude may attach, and they are crimes only because they are prohibited by statute. Generally [, but not always,] crimes male [malum] in se involve moral turpitude, while crimes mala [malum] prohibita [prohibitum] do not." [Certiorari denied 331 U. S. 843, 91 L. ed. 1854, 67 S. C. R. 1534].

When correctly quoted, the citation fails to support the contention of petitioners.

At page 24 of the Petitioners' Brief the contention is made that the case of *Blumenthal v. United States,* 332 U. S. 539, 68 S. CT. 248, 92 L. Ed. 154, establishes that the actions of Petitioners were not "malum in se." Not only is there no such holding in the case, but the purported quotation from the case is wholly erroneous and misleading due to omissions and errors. In this instance the purported quotation as contained in Petitioners' Brief is so badly misquoted that it is not possible to indicate by brackets, as we have heretofore done, the errors and omissions. We can only demonstrate the perversion of the language of this Court by quoting in full from the reported text that portion of the opinion which Petitioners purport to quote in their Brief:

"We have considered petitioners' remaining contentions and find them without merit."

"These include the argument that petitioners were prosecuted under the wrong statute. Section 4 (a) of the Emergency Price Control Act, 50 USCA Appx Sec. 904 (a), 11 FCA title 50, Appx 25, Sec. 4 (a), makes it unlawful as a misdemeanor, Sec. 205 (b), 50 USCA Appx Sec. 925 (b), 11 FCA title 50, Appx 25, Sec. 205 (b), for any person to sell or deliver any commodity in violation of price regulations, "or to offer, solicit, attempt, *or agree* to do any of the foregoing." (Emphasis added.) Petitioners regard the prohibitory words "or agree," etc., as repeal by implication of the general conspiracy statute, Sec. 37 of the Criminal Code, 18 USCA Sec. 88, 7 FCA title 18, Sec. 88, insofar as otherwise it might apply to the acts forbidden by Sec. 4 (a). There was no "implied repeal." Conviction under the general conspiracy statute requires more than mere agreement, namely, the commission of an overt act. See also Taub v. Bowles (Em Ct App) 149 F2d 817; H Rep No 827, 79th Cong 1st Sess 7, 8."

In the light of such errors, misstatements and inconsistencies in the Petition and brief, it is respectfully submitted that the Petition for a Writ of Certiorari is not worthy of consideration by the Court.

The question presented to the Court of Appeals was correctly decided by it and is supported by

ample authority. Although it is difficult to ascertain such facts from the petitioners' Petition and brief, the only question presented to the Court of Appeals for decision was whether one who had knowingly and intentionally entered into a contract to violate the Emergency Price Control Act of 1942, as Amended, and had paid out money to the other party to such illegal contract, could recover such payments in an equitable action for cancellation and rescission, in view of the facts as disclosed by the record.

The Court of Appeals held that such a recovery was barred by both the Equitable Doctrines of Lack of Clean Hands and *in pari delicto* (R. 742).

As presented to the Court of Appeals by the respondent's brief on appeal from the adverse decision of the District Court, such holding is amply supported and warranted by the following authorities:

Clean Hands Doctrine:

19 Am. Jur. "Equity," Secs, 470, 471, pages 324, 325.

Ford v. Caspers (D. C. Ill.), 42 F. Supp. 994, affirmed 128 F. (2d) 885.

Carolene Products Co. v. Evaporated Milk Assoc. (7th Cir.), 93 F. (2d) 202.

Mas v. Coca-Cola Co. (4th Cir.), 163 F. (2d) 505.

Precision Insl. Mfg. Co. v. Automotive M. Mach. Co., 324 U. S. 806.

Primeau v. Granfield, (2nd Cir.), 193 Fed. 911.

In Pari Delicto:

17 C. J. S. "Contracts," Sec. 272, at Pages 656-659.

White v. Barber, 123 U. S. 392.

St. Louis Railroad v. Terre Haute Railroad, 145 U. S. 393.

Marshall v. Lovell, 11 F. (2d) 632, 639, affirmed 19 F. (2d) 751.

Bowles v. Glick Bros. Lumber Co., (9th Cir.), 146 F. (2d) 566, 568.

Armour & Co. v. Blindman (D. C., Minn.), 73 F. Supp. 609.

Detroit Edison Co. v. Wyatt Coal Co., (4th Cir.), 293 Fed. 489.

Petitioners have cited to the Court no decision of any other Court of Appeals upon the same issue which is in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in this action.

There is no question of Federal law involved which needs to be or should be settled by this Court.

Neither is there any Federal question decided by the United States Court of Appeals for the Ninth Circuit in this action which is in conflict with applicable decisions of this Court.

In so far as petitioners seek to have this Court review questions of evidence and specific issues of fact, such matters are not subject to review upon a Petition for Writ of Certiorari.

General Talking Pictures Corp. v. Western Electric Company, 304 U. S. 175, 85 S. Ct. 849, 82 L. ed. 1273.
United States v. Johnston, 268 U. S. 220, 45 S. Ct. 496, 69 L. ed. 925.

We submit that the decision in the court of appeals is correct and the petition for a writ of certiorari should therefore be denied.

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